No. 80922-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JESSE MAGANA,

Petitioner,

v.

HYUNDAI MOTOR AMERICA; HYUNDAI MOTOR COMPANY

Respondents,

and

RICKY and ANGELA SMITH, husband and wife, et al.

Defendants

BRIEF OF AMICUS CURIAE WASHINGTON DEFENSE TRIAL LAWYERS

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I. STATEMENT OF THE IDENTITY, INTEREST AND SOURCE OF AUTHORITY OF AMICUS CURAIE.

The Washington Defense Trial Lawyers ("WDTL"), is an organization of trial lawyers in the state of Washington, who appear *pro bono* before this Court as *amicus curaie*, and are devoted to the preservation of civil defendants' rights.

Amicus WDTL asserts that this Court should affirm the court of appeals' reversal of the trial court's default judgment. Amicus does not condone the discovery conduct of defendants (at least as characterized by plaintiffs). However, the facts of this matter do not support the imposition of the ultimate sanction of a default judgment against defendants for failing to produce evidence which *may or may not* have been "material" to plaintiff's case.

II. ANALYSIS

A. Background of Judicial Sanctions for Discovery Violations.

There is no shortage of case law on the question of the imposition of sanctions for discovery violations.[1] There appears to be agreement that imposing a default judgment "merely for punishment" of a discovery violation is not allowed.

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[1] *See, e.g., Appellant's Op. Brief* at 73; *Respondent's Brief* at 23-30; *Pet. for Rev.* at 15-19; *Answer to Pet. for Rev.* at 15-18; *Supp. Brief of Pet.* at 8-12; and *Supp. Brief of Respondents* at 9-14.

B. Default Judgment (or Dismissal) is not Authorized for "Mere Punishment."

More than a century ago the U.S. Supreme Court in *Hovey v. Elliot*, 167 U.S. 409 (1897), noted "the unsoundness of the contention" that a defendant's answer could be stricken as punishment for contempt of court for withholding evidence. *Id.* at 424. Relying on basic principles dating back to Coke, Blackstone, and even Seneca, the *Hovey* court strongly endorsed the notion that "the want of power in all other branches of the government to condemn a citizen without a hearing" applies with like force to the judicial branch. *Id.* at 419.[2] A party cannot be denied its day in court unless extreme circumstances exist.

C. Default (or Dismissal) in Very Limited Circumstances.

Although the ultimate sanction of default (or dismissal) merely for punishment for a discovery violation violates Due Process, this does not mean such a remedy can never be imposed for withholding evidence. Indeed, twelve years after *Hovey,* the U.S. Supreme Court decided *Hammond Packing Co. v. Arkansas,* 212 U.S. 322 (1909). There, the Court held that a trial court could entertain that a factual presumption that the wrongfully withheld evidence would have benefited the opponent only

[2] This Court recently endorsed this proposition in *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 330 54 P.3d 665 (2002) (Due Process allows default--or dismissal--for discovery violations only if willful misconduct and substantial prejudice exist, and no lesser sanction will suffice).

if the evidence was "material" to the plaintiff's case. *Id.* at 351. Employing a presumption of materiality was the critical difference between *Hovey* and *Hammond Packing*. *Id.* at 351.[3]

D. Presuming That a Party Admits Certain Facts Based on Their Withholding "Material Evidence."

Understanding the analytical process by which prejudice is determined is critical to revealing the trial court's error here. The case law creates the following syllogism: (1) A default judgment (or dismissal) is only authorized if a party's willful misconduct has substantially prejudiced its opponent; (2) A trial court has discretion to employ a factual presumption that a party's withholding of *material* evidence has prejudiced its opponent; (3) Therefore, a default (or dismissal) is only appropriate if a party's discovery misconduct was willful, and involved the withholding of *material evidence* (and no other lesser sanction will suffice).

A trial court can employ a presumption that the material facts alleged or pleaded were admitted by a party's willful failure to answer discovery. *See Hammond Packing*, 212 U.S. at 351. The question then

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[3] Washington courts analyze this willful withholding of material evidence consistent with the substantial factor prong. Before a discovery sanction as extreme as default can be imposed, three factors must exist: (1) willful misconduct; (2) that causes substantial prejudice to one's opponent, and (3) a determination that no lesser sanction is adequate. *See Washington State Physicians Ins. Exchg. & Ass'n v. Fisons*, 122 Wn.2d 299 (1993); *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 497 (1997).

becomes: under what circumstance may a trial court employ this presumption? Due Process requires that the evidence withheld must have been "material." At minimum, it must likely be admissible at trial.[4]

The U.S. Supreme Court relied upon this Court's opinion in *Lawson v. Black Diamond Coal Mining Co.*, 44 Wash. 26 (1906), which reached just this result. *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 353 (1909). In *Lawson* this Court concluded:

> From a party's refusal to testify it may well be presumed that, if his testimony was given, it would sustain the cause of action or defense of his adversary, and we think that this is a presumption of law and the court's have a right to indulge.

41 Wash. at 32.[5]

For example, the refusal of a party to answer interrogatories "may be treated as an implied admission of the facts in relation to which a discovery is sought." *Id.* On the other hand, "if there are numerous issues in a case, and discovery is sought only as to one of these issues...it may well be doubted whether [a default judgment on all issues] can be

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[4] The standard must be "likely admissible at trial," rather than "possibly relevant," or simply "discoverable." These much lower thresholds do not address the central issue on the matter of prejudice: whether the withheld evidence would have made a difference to plaintiff at trial.

[5] Default (or dismissal) will not be appropriate in every case in which material evidence is withheld. There will be other factors to examine on the question of prejudice. Defendants discussed these factors in *Appellant's Opening Brief*, at 70-77. That is, depriving one's opponent of material evidence is necessary for a default, but is not sufficient in and of itself.

sustained under the authorities above cited." *Id.* A number of the interrogatories which the defendant in *Lawson* did not answer were "wholly irrelevant." *Id.* at 33. And "it would surely not be contended" that a failure to answer these irrelevant interrogatories would warrant the striking of an answer. *Id.* The party seeking the default must show that his adversary has failed to make discovery of facts material to the support of the action or defense. *Id.* at 32-33 (emphasis supplied).

Plaintiff admits this proposition. In discussing the *Associated Mortgage Investors v. G.P. Kent Construction Co., Inc.*, 548 P.2d 558 (Div. II 1967), plaintiff states that a default is consistent with Due Process principles when "a party fails to produce material evidence pursuant to court order." *Brief of Respondent*, at 29.

So, as to the question of when the presumption may be made, this Court resolved the question almost 50 years ago in *Mitchell v. Watson*, 58 Wn.2d 206 (1961). *Mitchell* involved a defamation action against well-known Seattle curmudgeon Emmett Watson, based on remarks he made in his "*This Our City*" column in the *Seattle Post-Intelligencer*. *Id.* at 208 ("Three noted ex-cons are busy about town putting together a burglar alarm system."). During his deposition, Mr. Watson (of Lesser Seattle fame), refused to reveal the source of his information. *Id.* The trial court found Mr. Watson to be in contempt of court, struck his answer and

entered judgment default against him (except on the issue of damages). *Id.* at 208. This Court reversed, relying upon *Lawson, supra*; *Hovey*, 167 U.S. 409; *Hammond Packing*, 212 U.S. 322; and *Societe International v. Rogers*, 357 U.S. 197 (1958), and set aside the default judgment.

The *Mitchell* court scrutinized the question of how the refusal to provide material evidence might support a presumption regarding that evidence.

> The court may presume and infer, as a matter of law, that the evidence withheld by defendant would, if produced, contradict the contemptor's contentions and support the contentions of plaintiff. The truth of matters thus presumed to be established may result in drastically limiting defendants' proof or in striking all or part of the pleaded defenses.

Mitchell, 58 Wn.2d 206. However, the evidence must go to the plaintiff's case:

> [W]hen a party invokes a harsh remedy of striking a pleading and taking a judgment by default, he must not only allege, but must prove, the facts showing the materiality of the facts of which a discovery is sought, where such materiality does not appear from the interrogatories themselves, and no such showing was made in this case. In other words, he must prove that his adversary has failed or refused to make discovery of material facts.

Id. at 217 (*quoting Lawson,* 44 Wash. at 36). The court continued:

> [T]he validity of an order striking a pleading pursuant to the statute under consideration is restricted to those cases where the failure to answer obviously withholds a

> fact or facts material to his adversary's case and is limited to the effect that ensues from any reasonable presumption which may be drawn from the refusal to discover such fact or facts.

Mitchell, 58 Wn.2d at 217 (emphasis in original) (*quoting Anderson v. Stanwood*, 167 P.2d 315, 319 (Ore. 1946)). The *Mitchell* Court remanded with instructions to vacate the default judgment.[6]

In sum, a default judgment cannot be entered for punishment. A party must be shown to have deprived one's opponent of material evidence before such a penalty may be exacted.[7] Only then may a trial court employ the presumption that the evidence withheld would have proven the opponent's case, thus satisfying Due Process.

E. Misconduct as a Proxy for Materiality

The trial court here conflated misconduct with prejudice. That is, the court had an adverse reaction to the perceived serious misconduct in discovery, and felt the need to impose the ultimate sanction. However, the question was never answered as to whether the late disclosed evidence was "material" to plaintiff's claims. The plaintiffs' bar honored her for her decision.

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[6] The *Mitchell* trial court was then "free to reject any and all evidence of mitigation of damages or other proffered defenses which are relevant to or have reasonable connection with the existence of the alleged informer [whose identity was withheld]". *Id.* at 218.

[7] As the high court of another state concluded: "Discovery sanctions cannot be used to adjudicate the merits of a party's claims or defenses unless a party's hindrance of the discovery process justifies a presumption that its claims or defense lack merit." *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 918 (Tex. 1991).

The parties appeared to concur at the hearing on plaintiff's motion for default evidence that the late disclosed (seat-back OSI) "could be" relevant to plaintiff's case, but there was not enough time to determine whether this was indeed so. CP 2665-66; 2669-70. Even according to plaintiff, "every witness at the [evidentiary] hearing agreed that it would be extremely difficult or impossible to develop the OSI evidence at this late date." *Brief of Respondent,* at 48. Rather, plaintiff's argument as to prejudice is theoretical: had the evidence been timely disclosed plaintiff "would have had substantial opportunities to develop broader and deeper analyses... But due to Hyundai's hiding the truth, neither Magana's experts nor the trial court had any time to properly address this evidence prior to either trial." *Id.* at 44.

Even the dissent below, in reasoning that the default sanction should be affirmed, agreed that there was no showing of materiality. *Magana v. Hyundai,* 141 Wn. App. 495, 532 (2007) (Bridgewater, J., dissenting). The dissent then curiously states "but that is not for us to decide." *Id.*

Quite to the contrary, that is exactly for the Court to decide, and is the central issue in this matter. No matter how egregious the discovery misconduct, the notion that the evidence "could have been" material is never the same as a finding that the withheld evidence was material to the

opponent's case. Thus, the trial court probably considered only one of the Due Process factors—willfulness—and did not apply the correct legal analysis to the question of "substantial prejudice." That is, Plaintiff could only have been prejudiced if "material" evidence had been withheld.

It is simply not appropriate to conclude that a strong showing on one prong (willfulness) overrides the need for any showing on the second prong (prejudice). In sum, misconduct (no matter how substantial) can never serve as a proxy for prejudice. The trial court erred.

F. The Due Process Clause Still Rules the Seas.

Plaintiff asserts that this Court's decision in *Fisons* "wrought a sea change in discovery practice under the state." *Brief of Respondent*, at 28. But, whatever signal the lighthouse sends cannot move the boundaries of land. The Due Process clause is a such a boundary. *See, e.g., Lawson*, 44 Wash. 26. "There are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Societe International v. Rogers*, 357 U.S. 197, 209-10 (1958) (*citing, Hammond Packing Co.*, 212 U.S. at 350-51; *Hovey*, 167 U.S. at 409).

G. Default (or Dismissal) Should Never be the Remedy Unless the Party Violates A Court Order.

A party should never be defaulted (or their suit dismissed) unless

they violated a court order. The better view appears to be that violation of the rules of discovery alone should never form the basis for such a severe sanction. *Smith v. Behr Process* appears to be the only Washington case to have done so, although the court did not discuss the significance of this result. *Smith v. Behr Process Corp.*, 113 Wn. App. 306 (2002). Ironically, the court relied on CR 37(b) which is entitled *Failure To Comply With Order*.

In *TransAmerican Natural Gas*,[8] as in this case and in so many others, the authority and guidance of the trial court should be invoked at an early stage so that an order could have been issued resolving the ongoing disagreement between the parties as to the timing or scope discovery.

Here, a simple motion to compel made when Defendants first allegedly failed to produce records, would have been the most economical method by which to avoid the situation where the parties in the instant matter found themselves. In addition, the trial court would not have had to spend days in a mini-trial deciding who said what to whom. And, if after

[8] The facts in *TransAmerican Natural Gas Corp.* are similar to the facts here, and those in many cases involving unresolved, lingering discovery disputes. There is finger pointing between lawyers, and disputes that have never been memorialized in a motion to compel or an order thereon. In that Texas case, lawyers for the parties could not agree on when the president of defendant corporation would present himself for deposition. Some gamesmanship seems to have been involved. *Id.* at 918-19. The trial court was disturbed by the behavior and defaulted the defendant. But the Texas Supreme Court held that the entry of a default judgment against defendant for not producing this witness for deposition was "manifestly unjust." *Id.* at 919.

that step Defendant Hyundai had violated the court order, that fact would be another factor on which to determine the severity of the sanctions imposed. Amicus WDTL is not convinced that the ultimate sanction of dismissal for the violation of discovery *rules*, as opposed to a discovery *order*, is appropriate or comports with Due Process. *See, e.g., Burnet v. Spokane Ambulance,* 131 Wn.2d 484, 497 (1997) (no exclusion of evidence "absent a trial court's finding that [the plaintiffs] willfully violated a discovery order); *TransAmerican Natural Gas Corp. v. Powell,* 811 S.W.2d 913, 918 (Tex. 1991) (noting legitimate goals of punishment and deterrence do not justify "trial by sanctions.").

H. Washington Constitutional Implications to Default Judgment or Dismissal.

In addition to federal and/or state Due Process implications of discovery violations resulting in a dismissal or default judgment, such might also violate the Washington constitutional right to a jury trial. Our state Constitution provides that a party's right to jury trial shall remain "inviolate." *Wash. Const.*, Art. I, §21. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 771 P.2d 711, *as amended*, 780 P.2d 260 (1989).

I. Electronic Discovery Implications.

Lastly, this case may well have significant implications for discovery in the 21st century, as electronic information becomes more frequently the

subject of discovery disputes. Electronic databases, files, and electronic mail have significantly multiplied the number of documents which are potentially subject to discovery.

J. Discovery Abuse Can Be a Problem

Discovery abuse and satellite litigation is a problem, but the problem is confined to a few kinds of cases. Two empirical studies of discovery conducted under the auspices of the Federal Judicial Center and the RAND Institute for Civil Justice, respectively, yield complementary data that support certain basic generalizations: first, "discovery problems and associated elevated levels of satellite litigation and expense are most likely to be concentrated in a minority of lawsuits characterized by high stakes, high levels of complexity, high levels of contentiousness or high volumes of discovery activity," second, "and more surprising, discovery is not significantly problematic but is working 'effectively and efficiently' in the majority of civil cases." John S. Beckerman, *Confronting Civil Discovery's Fatal Flaw*, 84 Minn. L. Rev. 505, 506-07 (2000) (citations omitted).

In this section of the brief, we explore why discovery misuse occurs, including incentives to propound discovery, incentives to evade discovery, the lack of legal guidance, and the role of the trial court.

1. Too much discovery is sought.

Magistrate Judge Wayne Brazil surveyed litigators and specifically litigators who work on larger cases. Litigators on larger cases complained that much of the information requested by opposing parties is either wholly irrelevant to matters in dispute or of only marginal utility." Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery,* 1980 Am. B. Found. Res. J. 217, 230 [herein after *Front Lines*]. In addition, Brazil reports that lawyers believed "only a small percentage of the information that their own discovery efforts produce is really useful." *Id.*

Brazil concludes: "[V]irtual consensus [exists] among larger case lawyers that the discovery system as they experienced it would not fare well in a rigorous cost-benefit analysis: many such lawyers apparently believe that the expense the process generates is often disproportionate to the value of the information it yields. Brazil, *Front Lines, supra,* at 234.

2. Typical Case to Expect Problems

a. A few kinds of cases suffer from "overdiscovery."

"Overdiscovery" is pervasive in a few kinds of cases.[9] According

[9] *See* Wayne D. Brazil, *Improving Judicial Controls over the Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions,* 1981 Am. B. Found. Res. J. 873, 880-81 [hereinafter Brazil, *Model Rules*]; Wayne D. Brazil, *Civil Discovery: Lawyers' View of Its Effectiveness, Its Principal Problems and Abuses,* 1980 Am. B. Found. Res. J. 787, 871 [hereinafter Brazil, *Civil Discovery*]; *see also* Joseph L. Ebersole

to Magistrate Brazil's research, attorneys working on larger cases complained most frequently about "overdiscovery." The complaints about overdiscovery increased for cases in federal court, antitrust cases, and cases involving corporate clients. Brazil, *Civil Discovery, supra*, at 831.[10]

b. Discovery is sought when the benefits exceed its cost.

A party to litigation will request discovery whenever the benefits of doing so exceed the costs of formulating the request. John K. Setear, *The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse*, 69 B.U. L. Rev. 569, 581 (1989). Benefits can fit into two broad categories: informational benefits and impositional benefits. "'Informational benefits' are benefits that the requesting party expects to gain from the *information* that she receives from the responding party." *Id.* (emphasis in original). "'Impositional benefits,' in contrast, are those benefits that the requesting party expects to gain because her request *imposes costs* upon the answering party." *Id.* at 582 (emphasis in original).

& Barlow Burke, Federal Judicial Center, *Discovery Problems In Civil Cases* 18-29 (1980) (recounting numerous reports of overdiscovery in a variety of contexts).

[10] Discovery requests were sometimes used for purposes other than obtaining information to prepare for trial. For example, discovery requests have reportedly been used "to exert economic pressure on a competitor, to uncover trade secrets, or to acquire information from an unwary nonparty in order to lay the foundation for a subsequent action against it." Brazil, *Model Rules, supra*, at 881.

Written discovery is free for the requesting party. While interrogatories are the least expensive form of discovery to prepare, they can be used as a means of harassment because they are costly to answer. See, e.g., Fed. R. Civ. P. 33(a), 1993 Advisory Committee Notes. Requests for documents can be equally burdensome.

c. Discovery Abuse and the Theory of Nuclear Deterrence

Discovery in civil litigation is understood with help from the Theory of Nuclear Deterrence. *See* Setear, The Barrister and the Bomb, *supra*, at 623-28.[11] If one side launches abusive discovery requests, the other side will suffer gravely and probably launch a retaliatory strike. *Id.* at 624.[12] Thus, launching an abusive discovery request becomes unattractive for both sides. "In this situation," one commentator writes, "we would expect that rational parties with a modest ability to peer into the future would ... refrain from abusing discovery." *Id.*

d. Nuclear Deterrence with Non-national Opponents

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[11] *See, e.g.*, Setear, *The Barrister and the Bomb*, at 601-10 (describing nuclear deterrence and technological requirements thereof as tit-for-tat reciprocity); *cf. id.* at 615-23 (discussing discovery abuse in terms of reciprocity); John K. Setear, *Discovery Abuse Under the Federal Rules: Causes and Cures*, 92 Yale L.J. 352 (1982) (same).

[12] WDTL does not condone mutual abuse of discovery. But, consider the incentives and lack of guidance: "Regardless of the source ascribed to the lawyer's duty to cooperate in the discovery process, however, few reported opinions analyze the duty, and none ... do so incisively or in depth." *Civil Disco Flaws*, at 532. This, said one commentator, "dearth of judicial analysis may result from the uncomfortable truths that the duty to cooperate in discovery conflicts directly with the lawyer's responsibility to the client, that courts have as much trouble reconciling the conflict as do advocates, and that they therefore do not like to think about the problem." *Id.*

"[D]iscovery abuse is likely to be prevalent in situations where there exists an asymmetry in the *opportunities* for discovery." *Id.* at 625. In other words, if one party is susceptible to endless discovery requests, the informational and impositional opportunities are great. If the other party has little or no exposure to discovery requests, it is not susceptible to abusive discovery or retaliatory discovery. An otherwise cooperative "relationship between the two parties is destabilized by the lack of credible, *mutual* retaliatory threats." *Id.* (emphasis in original). One should predict more discovery abuse in these situations.

e. Products liability cases are particularly susceptible.

Corporate clients are susceptible to overdiscovery because they generate and maintain more records than individuals. On the other hand, the relevant records maintained by one personal-injury plaintiff may be insignificant. In the context of a product liability case, the corporation is particularly susceptible to discovery requests in a way that it cannot deter.

Deterrence from overdiscovery does not work if only one side is susceptible. This has been the experience for cases in Washington. *Smith*, 113 Wn. App. 306 (consumer class vs. corporation for product defect); *Fisons*, 122 Wn.2d 299 (defendant produced product that caused bodily

injury); *Burnet*, 131 Wn.2d 484 (bodily injury case against corporations).[13]

K. Unclear rules inconsistently enforced do no deter the zealous advocate.

1. Clear rules with clear consequences that are consistently enforced encourage compliance.

Empirical science tells us how to encourage compliance. Daniel W. Shuman, *The Psychology of Deterrence in Tort Law*, 42 U. Kan. L. Rev. 115, 121 (Fall 1993). Researchers look at three important factors in deterrence: certainty, celerity, and severity of punishment. *Id.* In other words, how certain punishment is, how swift it is, and how severe it is. The research on celerity is inconclusive. *Id.* Severity "is not as significant and only becomes a relevant consideration when a sufficient level of certainty of punishment is achieved." *Id.*

Applying these concepts to compliance in civil discovery, making the sanction for non-compliance more severe will not improve the system as much as making rules clear and predictably enforced.

2. Trial judges could be more involved and more consistent.

Trial court judges should take a more active, principled, and predictable role in resolving discovery controversies. A survey found that

[13] Satellite litigation may proliferate. In the months following the trial court's entry of the default judgment, Plaintiff's counsel began speaking at seminars entitled "Aggressive Use of Sanctions to Penalize Discovery Violations." *See* Appx. A, CLE Notice of October 4, 2006 seminar; Appx. B, 1 Ann.2006 ATLA-CLE 1051 (2006). Amicus WDTL is concerned that such collateral fighting becomes the norm where parties attempt to "set each other up" for discovery violations to provoke an extreme sanction.

fifty-nine percent of attorneys (eighty percent of attorneys in large, complex cases) desired judges to assume a greater role in the discovery process. Brazil, *Civil Discovery,* at 863-64. Around eighty to ninety percent of lawyers "welcomed more aggressive use of the sanctioning power." *Id.* at 865-66. Those who were hesitant, however, noted that the sanctioning process was "arbitrary and unpredictable." *Id.* at 866.

Some commentators echo this opinion of the current role of judges in discovery. Attorneys reported that judges responded to discovery conflicts with "an air of undisguised condescension, impatience, or open hostility-implying that involvement in these kinds of disputes is either beneath their dignity or an unjustifiable intrusion on their time." Brazil, *Front Lines,* at 245-46. In addition, many attorneys complained that the judges' rulings often appear "to be little more than preprogrammed responses which reflect deeply ingrained biases" either for or against discovery. *Id.* at 246. Attorneys also reported that "magistrates are woefully underequipped in talent, time, and temperament." *Id.* In sum, sixty-nine percent of attorneys reported that they obtained insufficient aid from the court in resolving discovery conflicts. *Id.* at 247. Trial courts are not giving consistent, predictable, principled decisions in discovery disputes.

3. The law could be more clear.

This Court decided *Washington State Physicians Insurance Exchange & Association v. Fisons Corporation*, 122 Wn.2d 299, 858 P.2d 1054 (1993). Writing on *Fisons*, one commentator states: "Inevitably, there is a degree of tension between the duty to disclose under Fisons and the ethical duty to zealously guard a client's interests." Karl B. Tegland, Wash. Pract. Civil Proc.§21.3 (2008). He goes on, "The *Fisons* court itself acknowledged that its opinion did not preclude 'fair and reasonable resistance to discovery.'" *Id.* And then states, "The Washington case law does not yet specify precisely where the line should be drawn, and reasonable minds can easily disagree." *Id.*[14] The law is not as clear as it could be on where to draw the line between advocacy and required cooperation in discovery.

L. <u>Proposals for Curing Discovery Disputes</u>

This Court should issue clear rules and trial courts must work hard to apply them. More analysis of discovery disputes being resolved by appellate opinions might provide valuable analogies.

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[14] (citing Gordon, Randolph I., The Riddle of Fisons: When is Discovery Not Discovery?, Wash. St. Bar News, Aug. 1996, pp. 22-27; Fucile, M., Discovery Ethics: Playing Fair While Playing Hard, Wash. St. Bar News, May 2006, pp. 26 to 29; Harnetiaux et al., Harnessing Adversariness in Discovery Responses: A Proposal for Measuring the Duty to Disclose After *Physicians Insurance Exchange & Ass'n vs. Fisons Corporation,* 29 Gonz. L. Rev. 499 (1994)).

The cost of moving for a protective order or moving to compel discovery is high. It may be necessarily high.

The objecting party is expected to move for an order of protection, however, this is routinely ignored by bench and bar. It also actively encourages overdiscovery. The requesting party should ask questions that are clear. "Interrogatories that are clear and concise leave less room for the responding party to object or to provide vague and evasive answers. Interrogatories that do not seek objective facts invite artfully drafted responses and generalities that are apt to be of little use to the proponent." 21st Century Litigation: Trial and Pretrial (June 6-7, 2002) (SG103 ALI-ABA 167). If the question is either unclear or so obviously burdensome that it should be reframed, the answering party should not bear the burden of moving for an order of protection.

Also, courts may experiment with efficient processes. *See, e.g.*, Local Rules W.D. Wash. 37(a)(2)(B).

III. CONCLUSION

Amicus WDTL urges this Court to affirm the opinion of the Court of Appeals below to the extent that it reversed the trial court's entry of default judgment.

RESPECTFULLY SUBMITTED this 23 day of December, 2008.

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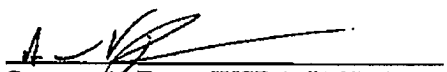

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IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 23 day of December, 2008.

Valerie Mellan

Appendix A

HOT TOPICS IN TORTS

WEDNESDAY, OCTOBER 4, 2006
WASHINGTON STATE CONVENTION & TRADE CENTER • SEATTLE

CHAIRPERSONS:
VIRGINIA L. DECOSTA & PAUL L. STRITMATTER

9:00-9:25 **Aggressive Use of Sanctions to Penalize Discovery Violations.**
Paul L. Stritmatter, Seminar co-chair, Stritmatter Kessler Whelan Withey Coluccio, Hoquiam

9:25-9:45 **Communication Skills in Voir Dire**
John L. Messina, Messina Bulzomi Christensen, Tacoma

9:45-10:20 **Supreme Court Update**
Bryan P. Harnetiaux and Debra L. Stephens, Amicus Co-Coordinators, WSTLA Foundation

10:20-10:35 **BREAK**

10:35-10:55 **How to Try Damages Without Medical Testimony**
Paul L. Stritmatter, Stritmatter Kessler Whelan Withey Coluccio, Hoquiam

10:55-11:15 **Update on Partial Settlements:**
Where we are and where we are going.
David M. Beninger, Luvera, Barnett, Brindley, Beninger & Cunningham, Seattle

11:15-11:35 **Dueling UIM Policies:**
Stack 'em up!
Ann H. Rosato, Peterson Young Putra, Seattle

11:35-11:55 **Feline Plaintiffs and Canine Defendants:**
Tort Law is raining cats and dogs.
Adam P. Karp, Adam P. Karp, Esq., Bellingham

11:55-12:00 **Questions & Answers of the Speakers**

12:00-1:15 **LUNCH (on your own)**

1:15-1:35 **Secrecy & Privacy Orders**
Judge Mary E. Roberts, King County Superior Court, Seattle

1:35-1:55 **Confessions of a Collection Lawyer**
John Budlong, Law Offices of John Budlong, Edmonds

1:55-2:35 **Appellate Court Update**
Bryan P. Harnetiaux and Debra L. Stephens, Amicus Co-Coordinators, WSTLA Foundation

2:35-2:55 **Excluding Annuity Evidence from Trial**
Ralph Brindley, Luvera, Barnett, Brindley, Beninger & Cunningham, Seattle

2:55-3:15 **Electronic Discovery and Its Pitfalls**
Robert A. Medved, Law Offices of Robert A. Medved, Mercer Island

3:15-3:25 **Questions & Answers of the Speakers**

3:25-3:40 **BREAK**

3:40-4:00 **Hot Commercial Torts:**
Minority Shareholder Oppression, Franchise Investment Protection Act, Washington State Securities Act, Washington State Personality Rights Act.
Michael S. Wampold, Peterson Young Putra, Seattle

4:00-4:20 **Vulnerable Adult Statute:** Protecting our elders.
Virginia L. DeCosta, Seminar Co-chair, DeCosta Law Firm, Tacoma

4:20-4:30 **Questions & Answers of the Speakers**

5.75 Total CLE credits

Appendix B

Association of Trial Lawyers of America

July, 2006
ATLA Annual Convention Reference Materials
Volume 1
Stalwarts/Hall of Fame

EFFECTIVE USE OF DEMONSTRATIVE EVIDENCE TO WIN SANCTION MOTIONS FOR DISCOVERY VIOLATIONS

Table of Contents, List of Authors

Michael E. Withey [FNa]

I. Introduction

Jesse Magana is a patient man.

Magana was paralyzed in February 1997 when the front passenger seat of a 1996 Hyundai Accent collapsed backward in a crash and allowed him to be catapulted out the back hatch of the car. Magana was wearing his seat belt, but it became useless when the seat back disappeared behind him.

Magana received a substantial verdict against Hyundai Motor America and Hyundai Motor Company in June 2002, and waited patiently through an appeal and preparations for a retrial.

But Magana lost some of his patience just before that retrial was set to begin. That's when he learned firsthand that Hyundai had failed to disclose incidents similar to his own where seat backs had failed in a variety of accidents.

Magana and his attorneys filed a motion pursuant to CR 37 asking Clark County Superior Court Judge Barbara Johnson to end the five-year-old legal battle with a default judgment against the two Hyundai companies for their deliberate failure to produce crucial evidence.

On January 20, 2006, Judge Johnson ended a four-day evidentiary hearing on plaintiff's motion for discovery sanctions with an hour-long oral ruling that delivered detailed findings that Hyundai Motor Company, Hyundai Motor America, and their attorneys, had committed discovery violations that were "willful" and "egregious" and that denied Jesse Magana his right to a fair trial